83-363

No. .....

IN THE

Supreme Court of the United States

October Term, 1983

THE STATE OF CONNECTICUT,

Petitioner,

v.

CHARLES F. UBALDI,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Connecticut

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTIONS PRESENTED

1. May a state court reverse a criminal conviction because of prosecutorial misconduct in the absence of a showing that the defendant was thereby deprived of a fair trial without properly considering the doctrine of harmless error?

2. If the state court does so, does it needlessly punish society and deprive the people of the government guaranteed them by Article IV, Section 4 of the United States Constitution, of their rights to life, liberty, and property guaranteed by the fifth and fourteenth amendments, and of the domestic tranquility sought to be insured by the United States Constitution?

3. Did the state court misapply the doctrine of *Smith v. Phillips*, 455 U. S. 209 (1982), and *United States v. Hasting*, — U. S.—, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983), in reaching such a result?

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The petitioner, the State of Connecticut, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Connecticut entered in this proceeding on July 5, 1983.

OPINION BELOW

The opinion of the Connecticut Supreme Court is reported at 190 Conn. 559, —A.2d— (1983), and appears in the appendix hereto. (Appendix A).

JURISDICTION

The decision of the Supreme Court of the State of Connecticut was entered on July 5, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Preamble:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Constitution of the United States, Article IV, Section 4:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Facts

I.

The defendant was charged with five counts of larceny in the first degree and one count of larceny in the second degree. His trial commenced on June 21, 1978, and on June 28, 1978, the jury returned a verdict of guilty on all six counts as charged. (T-518-22, 6/28/78).

During the six days of trial, the jury was presented with 26 exhibits and heard some 500 pages of testimony from 22 witnesses.

II.

At trial, the State presented the following evidence to show that the defendant Ubaldi, a deputy sheriff of New Haven County, intentionally and wrongfully converted the City of Waterbury's tax money to his own personal use, thereby depriving the City of its property:

Mr. Fred Cohen, the comptroller of Savelle Ford in Waterbury, testified that on April 19, 1976, he delivered a check to Delinquent Tax Collector John Bedell in partial payment of some $25,000 owed the City in back taxes. (T-6-7, 6/15/78). The check was issued in the amount of $5,000 and was made payable to "Tax Collector - City of Waterbury." (State's Ex. A; T-8, 6/15/78). When the cancelled check was returned, however, it was not endorsed by the tax collector but by "Charles Ubaldi - Deputy Sheriff 201777-6." Mr. Cohen later discovered that these funds had not been applied against Savelle's tax debt. (T-10, 13, 6/15/78). Mr. Cohen did not know defendant Ubaldi nor did he authorize him or anyone other than the Tax Collector to cash Savelle's check. (T-11, 6/15/78). In no event, Mr. Cohen stated did he authorize the use of Savelle's money for any purpose other than to satisfy Savelle's tax debt. (T-11, 6/15/78).

Mr. Elliot Anderson, the President of Tires Inc., testified that on April 8, 1976, he issued a check payable to "City of Waterbury, Tax" in the amount of $3,907.99 in partial payment of back taxes owed the City. (T-23-25, 27, 6/15/78). The check was delivered to the defendant and, after being paid, was returned to Tires Inc. with the sole endorsement of "Charles Ubaldi - Deputy Sheriff Trust Acc't - Client's Fund 201777-6." (State's Ex. B; T-30, 6/15/78). These funds were not applied against the tax debt of Tires Inc. (T-31, 6/15/78). Mr. Anderson testified that he did not owe defendant Ubaldi any money and did not authorize any use of the funds other than to pay, in full, taxes owed the City. (T-31-32, 6/15/78).

Mr. Paul Gimbel, general manager of Red Bull Inn, testified that on April 8, 1976, a check in the amount of $3,784.32 was issued by the Inn to "City of Waterbury - Tax Collector" in partial payment of taxes owed the City. (T-35-37, 6/15/78). The check was delivered to the defendant and, after being paid, was returned to Red Bull Inn with the sole endorsement of "Charles Ubaldi, Deputy Sheriff, Trustee Account 201777-6." (State's Ex. C; T-36, 6/15/78). Mr. Gimbel neither knew defendant Ubaldi nor authorized him to expend the money for the defendant's personal use. (T-41, 6/15/78).

Mr. Robert Pickett, the comptroller in 1975 and 1976 for Green Valley Developers which owned the Fair Lawn Apartments of Waterbury, testified that a check in the amount of $5,978.36 was delivered to the defendant in partial payment of tax arrearages owed the City. (T-44-46, 6/15/78). The check was made payable to "Tax Collector - City of Waterbury" but, after being paid, was returned with the single endorsement of "For deposit only Charles Ubaldi Deputy Sheriff Trustee Account-201777-6." (State's Ex. D; T-47, 6/15/78). No amount of this check was credited against Green Valley's arrearages to the City. (T-47-48, 6/15/78). Mr. Pickett testified that he never authorized defendant Ubaldi to spend Green Valley's money for the defendant's personal use. (T-55, 6/15/78).

Attorney James Kernan of the Waterbury law firm of Feeley, Elliot and Nichols testified that in 1976, Mr. Scardetti, a client of the firm, drew a check on the firm's trustee account in the amount of $1,000 made payable to "Tax Collector, The City of Waterbury." (State's Ex. E; T-58, 6/15/78). Mr. Scardetti then testified that he owed the City back taxes on Ideal Package Store and that he drew the $1,000 from the Feeley law firm account and delivered it to the defendant on August 29th or 30th of 1975 in partial payment of Ideal's tax debt. (T-77-80, 6/16/78). After being paid, the check was returned with the endorsement of "For deposit #201777-6," but Ideal had not received credit for the payment. (T-80-81, 6/16/78). Mr. Scardetti testified that he did not authorize the defendant to utilize the money in any way other than to apply it against Ideal's tax debt. (T-81, 6/16/78).

Mr. George Forish, owner of Central Manufacturing Co., testified that in 1976 he issued four checks of $2,000 each to "City of Waterbury" in payment of delinquent taxes owed the City. (T-61, 63, 6/15/78). Two of these checks were credited to Central's delinquent tax account, two of them were not. (T-63, 6/15/78). The two checks for which no credit was received were both returned to Central, after being paid, with the single endorsement of the defendant. (State's Exs. F and G; T-64, 6/15/78). Mr. Forish testified that he only authorized the defendant to apply Central's money against his back taxes and not for the defendant's personal use. (T-65, 6/15/78).

Donald E. Holley, former Deputy Tax Collector of Waterbury, testified that in 1976 he had concentrated primarily on the collection of delinquent taxes. (T-93, 6/16/78). In August of 1976, Mr. Holley checked the City's records for payment of delinquent taxes in respect to Savelle Ford. There was no record of the $5,000 payment made by Savelle in April of 1976. (T-94, 6/16/78). He stated that an alias tax warrant, the legal document empowering a deputy sheriff to collect taxes, was not issued against Savelle and, consequently, the defendant, the Deputy Sheriff, had no business handling Savelle's check. (T-94-95, 6/16/78). Mr. Holley then

stated that he checked Fair Lawn Apartment's account. There was no record of receipt of Fair Lawn's $5,978.36. (T-96, 6/16/78). He checked Red Bull Inn's account and found neither a warrant issued nor a record of the Inn's payment of $3,784.32. (T-97, 6/16/78). Mr. Holley also testified there was no tax warrant issued against Central Manufacturing Co., and there was no record of two of Central's four checks of $2,000 each. (T-97-98, 6/16/78). Mr. Holley then stated that no record of receipt of Ideal's $1,000 could be found. (T-98, 6/16/78). Finally, as to Tires Inc., Mr. Holley testified that there was no tax warrant issued and no record of Tires' $3,907.99. (T-99, 6/16/78).

Mr. Holley then testified that he reported all of these findings to the Tax Collector, Donald Rinaldi. (T-99, 6/16/78). Mr. Holley further stated that it was the duty of the Delinquent Tax Collector John Bedell and the deputy sheriffs to turn the collected monies over to the City. (T-99-100, 6/16/78). Mr. Holley testified that in Waterbury, taxes collected are turned over daily and that Connecticut General Statutes require that the money be paid over at least monthly. (T-99-100, 6/16/78). Mr. Holley also testified that City constables and sheriffs are professionals and that they are well instructed in their fiduciary duties and prerogatives. (T-100, 6/16/78). There could be no way that a sheriff would or could reasonably believe, Mr. Holley testified, that his office allowed appropriating tax money for personal use. (T-100, 115-17, 6/16/78).

Donald Rinaldi, Tax Collector for the City, testified that he became aware of the defendant's wrongdoings in August of 1976 when a photocopy of Savelle's cancelled check was presented to him. (T-135, 6/16/78). Mr. Rinaldi stated that after several conversations with Fred Cohen of Savelle and Delinquent Tax Collector Bedell, he called defendant Ubaldi in to account for Savelle's $5,000. (T-137-43, 6/16/78). Mr. Rinaldi stated that the defendant brought in the $5,000 with interest at the end of August, 1976. (T-144, 6/16/78). At this time, Mr. Rinaldi stated that he did not know about the defendant's collections made

from Fair Lawn, Red Bull Inn, Central Manufacturing Co., Ideal Package, or Tires Inc. (T-145-46, 6/16/78). He became aware of the defendant's activities, however, when after the Savelle incident, Red Bull Inn called the tax department concerning a bill that they had received which included an amount already paid. (T-146, 6/16/78). Mr. Rinaldi obtained a photocopy of the cancelled check and called a meeting with the Mayor's office and High Sheriff Healey. (T-146, 6/16/78). The police were subsequently called in and the defendant was advised to get an attorney. (T-149, 6/16/78). Mr. Rinaldi also testified that all but Savelle's payment had still not been paid over to the City. (T-150-51, 6/16/78).

As to the impropriety of the defendant's actions, Mr. Rinaldi testified that by statute alias tax warrants are to be served within 30 days of issuance and that collections on the warrants are to be turned in within 10 days after service. (T-157, 6/16/78). He stated that the defendant did not offer to pay any money until each collection was individually discovered. (T-150-51, 165, 6/16/78). Finally, Mr. Rinaldi stated that he did not have to tell the deputy sheriffs that they could not appropriate City funds for their own personal use because they knew it. (T-164, 6/16/78).

Richard Barbieri, who was associated with Edstan Manufacturing Co. in 1975 and 1976, testified that during that time, the defendant often placed orders with his company for machine work on derringer pistols. (T-184, 6/21/78). The State then presented Mr. Barbieri with a series of checks and asked if he could identify them. (State's Ex. I). These checks, totaling $3,062.50, were identified by Mr. Barbieri as those issued to him by the defendant in partial payment for services rendered on the derringers. (T-186-87, 6/21/78). These checks were drawn on "Charles Ubaldi, Deputy Sheriff Trustee Account, Client Funds." (T-187, 6/21/78).

Mr. Thomas Grillo, a retired I.R.S. auditor, who reconstructed the account of "Charles Ubaldi, Deputy Sheriff Trustee Account, Client Funds," State's Exhibits "I" and "J", from July 1975 to

August 1976, then testified. State's Exhibit "J" showed that most re-occurring checks were to Joanne Ubaldi, defendant Ubaldi's wife, Edstan Manufacturing Co., and Nick Jamele. (T-207-08, 6/21/78). The exhibit also showed that while in the thirteen-month period from July 1975 to August 1976, $49,499.35 was collected in back taxes, only $22,987.50 was paid over to the City, leaving a balance of $26,511.85 that, according to Mr. Grillo, was collected on the City's behalf but not paid over. (T-206-08, 6/21/78). Mr. Grillo stated that on the basis of his experience and training, this "Client Funds" was being used as a general purpose account and City money was being used for the defendant's personal obligations. (T-210, 6/21/78). Finally, Mr. Grillo testified that at the time the account was closed in August of 1976, there was a balance of about $9,000 and that had the defendant's brother not deposited $10,000 in late August, the account would have been overdrawn. (T-211-12, 6/21/78).

At the trial the defendant testified on his own behalf. He stated that he was appointed a deputy sheriff in July of 1975 and that this was a political appointment through his brother Joseph Ubaldi, who was the Democratic Town Chairman of Waterbury. (T-232, 6/21/78). He stated that he was involved in three companies: General Precision, Renco Specialties, and Talon. He also operated a sporting good store which was a retail outlet. (T-232-33, 6/21/78). He stated that he was under heavy financial pressures and that when General Precision went out of business in July of 1975 he had some $60,000 to $80,000 of debt for which he was personally liable. (T-235-36, 6/21/78). His creditors were after him and the I.R.S. had liens on his property. (T-236-37, 6/21/78). He testified that he opened his "Client Funds" account when he became a sheriff so that his creditors could not attach any personal funds he put into it. (T-237, 6/21/78). He admitted going to various business establishments, introducing himself in his official capacity, and collecting back taxes. (T-237-40, 247-58, 6/21/78). He admitted placing these funds into his account, not apprising the tax department of the collections, and using the

money for personal bills. (T-260-62, 6/21/78). He stated that he did all of this because no one ever told him when these funds had to be paid over to the City. (T-257, 6/21/78). He stated that when he was confronted by Tax Collector Rinaldi and Corporation Counsel Sullivan concerning the whereabouts of the Savelle money, the reason why he did not apprise the tax office that other collections had been made but not paid over was because he did not have an accurate figure. (T-262, 6/21/78). Indeed, he claimed even to the date of trial not to know how much he owed the City for taxes he had collected. (T-262, 6/21/78). Consequently, the defendant said that he paid over to the City only what was requested by the City. (T-262, 6/21/78).

Defendant Ubaldi's testimony then turned to the explanation of the $10,000 deposited in his trustee account by his brother after Tax Collector Rinaldi suggested that the defendant get an attorney. Defendant Ubaldi stated that he kept money in a hole in his cellar. (T-263-64, 6/21/78). At the time he was confronted by the City's tax department and High Sheriff Healey, he knew that the balance in the trustee account was far below the amount requested by the tax office. (T-262, 6/21/78). Consequently, the defendant took $10,000 from his hiding place in his cellar and gave it to his brother to deposit in the trust account. (T-264-65, 6/21/78). The reason why he did not deposit the money himself was because he had out of town business to do. (T-276, 6/21/78).

Jeremiah Keefe testified that he represented the defendant prior to present counsel. He stated that he had two meetings with City officials before the defendant was arrested. He told the participants of these meetings that he would make defendant Ubaldi's books available if immunity were granted to the defendant. (T-361, 6/22/78). He stated that immunity was never granted, the records were never turned over, and the City never told him how much the defendant owed. (T-362-64 6/22/78).

The defendant then called three character witnesses who testified to the defendant's general reputation of helpfulness in the com-

munity. (T-372-82, 6/22/78). At this point, the defendant rested his case. (T-382, 6/22/78).

The State then offered the following rebuttal evidence:

Henry Healey, the High Sheriff of New Haven County in 1975 and 1976, testified that for the first 30 days of employment the defendant was assigned to and trained by one of the best veteran sheriffs on the 60-man force. (T-400, 6/27/78). This training included how to make proper service and how to make a proper return to the court after service had been made. (T-400, 6/27/78). The training also included the use and directives of the alias tax warrant. (T-400, 6/27/78). Sheriff Healey then stated that if the defendant had not learned the basics of the job, he would have been terminated after the 30-day in-service training. (T-406, 6/27/78). Consequently, according to Sheriff Healey, the defendant knew the duties and prerogatives of a deputy sheriff. (T-406-07, 6/27/78).

Arthur Hinkelman, then the Deputy Tax Collector for the City, testified that, contrary to the defendant's testimony concerning the defendant's present ignorance of monies owed the City, the defendant requested and was sent a letter on June 1 or 2 of 1978 apprising him of the amount he owed. (State's Ex. K; T-432-35, 6/27/78).

Mr. Joseph Schiaroli, chief building inspector for the City since 1970, testified to rebut the defendant's statement that he had paid $6,000 to Nick Jamele for footing and foundation work done to his house built in 1974 or 1975. (T-289-90, 6/21/78). Mr. Schiaroli stated, among other things, that the defendant built his house in 1971 not in 1974 or 1975, that the top cost of a first-rate foundation and footing job would be no more than $2,500, and that there was no building permit issued on defendant's house in 1974 or 1975. (T-454-55, 6/27/78).

Rulings Below

The defendant brought an appeal to the Connecticut Supreme Court based on two trial rulings concerning two motions for a

mistrial. The defendant claimed that, in the first instance, the State unfairly prejudiced the jury by asking a question concerning Nicholas Jamele. In the second instance, the defendant claimed that the State's reference in summation to a missing witness permitted the jury to draw an impermissible inference against the defendant.

I.

DEFENDANT'S FIRST MOTION FOR A MISTRIAL

The defendant's first claim of error arose over a question put to the defendant on cross-examination by the State concerning the defendant's expenditure of City delinquent tax money on personal debts. The verbal exchange was as follows:

Q. And there is a third marking here, Nick Jamele? [Referring to a check written by the defendant].

A. Yes, sir.

Q. He is your bookie; isn't he, Mr. Ubaldi?

MR. MOYNAHAN: Oh boy, objection. I think the jury ought to be excused.

THE COURT: If you want to address something to me I think you ought to stand up.

MR. MOYNAHAN: I certainly will. That is, I have something to address to the Court.

THE COURT: Why don't you take your break, ladies and gentlemen.

(Jury leaves courtroom.)

(In the absence of the jury.)

MR. MOYNAHAN: I move for a mistrial, Your Honor, I am sorry, Your Honor, that I didn't stand up. I am sorry for acting the way I did. I

apologize to the Court for that. But that question completely floored me. I think it is so clearly out of order. I really can't believe that Mr. Ward asked it. There is no background, no nothing for it. It can only be designed to inflame and prejudice the jury against Mr. Ubaldi. I very strongly urge the Court to grant my motion for a mistrial.

THE COURT: Read that back to me.

(Question read by the reporter).

THE COURT: We will take a recess and I will speak to the attorneys in chambers.

(Court recessed.)

(Court resumed.)

THE COURT: I am not going to declare a mistrial. All right, bring in the jury and do you want to resume the stand please.

MR. MOYNAHAN: May I have an exception?

THE COURT: Sure.

MR. WARD: Is there an objection to my question, Your Honor?

THE COURT: I don't know if he objects to the question.

MR. WARD: I just heard one oh boy.

MR. MOYNAHAN: I then objected.

THE COURT: I will sustain the objection to the question. You need not answer the question.

MR. MOYNAHAN: Would the Court give the jury any instructions?

THE COURT: Oh sure. All right, ladies and gentlemen, we are going forward with the trial.

Mr. Ubaldi's attorney has objected to the question and I have sustained the objection to the question and he need not answer it and I would urge you to disregard the question itself. Pay no heed to it. It is not relevant. It is not significant in the case. It is to play no part in your deliberations.

All right, sir.

(T-287-88, 6/21/78).

II.

THE DEFENDANT'S SECOND MOTION FOR A MISTRIAL

The defendant's second motion for a mistrial stems from a question asked by the Assistant State's Attorney during the State's summation to the jury. Although both parties agreed prior to their summations not to have this portion of the trial recorded, the following is a reconstruction, in relevant part, of the State's summation based upon the court stenographer's notes:

MR. WARD: Where is Nick Jamele? Where is the man that he paid six thousand dollars to?

THE COURT: Please, let there be no whispering in the courtroom?

MR. MOYNAHAN: Objection, Your Honor. May I approach the bench?

THE COURT: Yes.

I take it, counselor, you don't intend to pursue it more than you have already?

MR. WARD: No, Your Honor.

Where was John Bedell? Why didn't he come forward and testify?

MR. MOYNAHAN: Same objection, Your Honor.

MR. WARD: May I continue, Your Honor?

THE COURT: Yes.

(T-481, 6/27/78).

On the basis of this exchange, the defendant moved for a mistrial after argument of counsel, in the absence of the jury, and before the jury was charged. (T-484, 6/27/78). In the absence of the jury, the court denied the defendant's motion. (T-515, 6/28/78).

In charging the jury, the trial court commented as follows:

> Now, there doesn't seem to be any question in this case and if I am wrong about this, gentlemen, I want you to stop me in the middle of what I am saying. There doesn't seem to be any question in this case that Charles Ubaldi on I think at least two occasions, with one Mr. Bedell, the delinquent tax collector, and Charles Ubaldi at the time a lawfully appointed deputy sheriff, went to these delinquent taxpayers whose names I am sure are still vivid in your mind, and at certain times he was clothed with proper tax warrants, alias tax warrants, and other times without alias tax warrants, and the people who owed money to the City of Waterbury gave partial payment or total payment of what they owed the City and they made out checks. And each of those checks, if my recollection is right, was made payable to the City of Waterbury and to the Tax Collector. And Charles Ubaldi, the deputy sheriff, took those checks. There doesn't seem to be any question about that. In a couple of instances I think the check may have been handed first to Mr. Bedell and then Mr. Bedell

gave it to Charles Ubaldi or Charles Ubaldi himself originally got the checks, and he endorsed them in his own name, Trustee Account, and the name was always the same, and the number of the trust account was always the same, or was Clients Fund, and he put the money in the bank. There were thousands of dollars involved. And then he spent that money - - I think he admitted that - - for his own purpose because he needed to do it. He was financially strapped. He was in economic dire straits and he used the money for personal reasons. The man forthrightfully stated that he gave some money to his wife, gave some money to people he owed money to, used the money for his business. He was in serious trouble. And the matter was brought to his attention because these people who paid the money discovered that they had not been given credit for these payments by the Tax Department. And, of course, they said to him, "What is going on here?" So they made telephone calls, or whatever it was, and this matter was brought to the attention of the city. And Charles Ubaldi was called in. And in the case of Savelle Ford, which I think was the first one, for five thousand dollars, he said, "Oh, my goodness, this makes it appear as if I am a thief. I will give the money back." And he gave that money back. And as to the others he never did do that. Never gave the money back.

I think the evidence is that as of now the money has not been returned. And he gave some explanation for that, that he never knew how much he had to give back, so he didn't give it back.

(T-504-06, 6/28/78). The defendant took no exception to this portion of the charge.

In its charge, the trial court also stated:

> Charles Ubaldi took the stand. He is the accused. He need not have testified at all. The law clothes him with protection of silence. He need not, as I said, have testified. And if he had not testified the law would say you could draw no inference against him because of his silence. *He had no need to bring in any witnesses in this case at all because he had no need to put up a defense,* if he did not wish to do that. So he could have remained silent. However, he refused to do that and he took the stand in his own defense. And once he does that then you have to apply the same standards of determining truth and veracity that you do to every other witness. The fact that he took the stand does not shift the burden of proving anything to him. The burden of proof still remains on the state to prove, if it can, that he is in fact guilty beyond a reasonable doubt. And I will discuss that in a moment.

(T-494-95, 6/28/78) (emphasis added).

III.

On July 5, 1983, the Connecticut Supreme Court reversed the defendant's conviction and ordered a new trial. *State v. Ubaldi*, 190 Conn. 559, —A.2d— (1983). (Appendix A). Although it did not order a new trial on the basis of the defendant's first motion for mistrial, it did so on the basis of the second mistrial motion. The Connecticut Supreme Court concluded that the prosecutor's conduct was intentional misconduct and that the appropriate remedy was a new trial since the prosecutor's actions prejudiced the defendant and were in defiance of the trial court's authority. *State v. Ubaldi*, 190 Conn. at 564-75, —A.2d—. (Appendix A at 5a-16a). In so doing, the Connecticut Supreme Court discussed at

length the principles of law found in *Smith v. Phillips*, 455 U. S. 209 (1982), and in *United States v. Hasting*, —U. S.—, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). *State v. Ubaldi*, 190 Conn. at 568-75, —A.2d—. (Appendix A at 10a-16a).

ARGUMENT

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE WHERE THE CONNECTICUT SUPREME COURT APPLIED AN UNCALLED FOR SANCTION AGAINST THE PUBLIC

The Connecticut Supreme Court, imputing bad faith to a prosecutor, ordered a new trial in a criminal case where the defendant took the stand and admitted his guilt in the face of overwhelming evidence because of what the court perceived to be the prosecutor's misconduct.

This unnecessary reversal of a criminal conviction lessens respect for the criminal law and its civilizing effect. It should have only occurred within our constitutional framework when required because of material prejudice to an accused.

The United States Constitution was established and ordained to, among other things, insure domestic tranquility. Article IV, Section 4 of that Constitution guarantees to the people of each state a republican form of government. Absolutely implicit in the concept of government is the requirement that each state control the criminal activity which, if it continues unchecked, will finally destroy and is now destroying the rights to life, property, and liberty of our law abiding citizens. Those law abiding citizens are also guaranteed those rights under the fifth and fourteenth amendments of the Constitution unless taken by due process of law.

This Court should review such a decision to insure the public safety and the domestic tranquility required by the federal Constitution.

The petitioner recognizes that the matter of federal-state relations poses many delicate problems. However, this Court recently has spoken out clearly, emphatically, and repeatedly concerning

the doctrine of harmless error and the dynamics of trial, *see also Oregon v. Kennedy*, 456 U.S. 667 (1982), and its decisions should be followed. There simply must be some reasonable limit upon the power of state courts to reverse criminal convictions and that limit, in the interest of public safety, is fixed by both the intent and language of the federal Constitution.

II.

THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE BECAUSE THE ORDER FOR A NEW TRIAL WAS UNCALLED FOR

The defendant was charged with embezzling city tax receipts which he collected as a sheriff. Six taxpayers took the stand and testified that the defendant collected tax payments, and the tax collector's office testified that the defendant did not turn over $26,000.00 of those receipts. As the Connecticut Supreme Court observed, the defendant himself took the stand and testified he was in receipt of the tax payments and failed to turn them over to the city. *State v. Ubaldi*, 190 Conn. 559, 572, —A.2d— (1983). (Appendix A at 13a).

The remark of the prosecutor questioned the whereabouts of a man to whom the defendant had given $6,000.00 of the missing tax receipts. The remark was followed by the trial court's charge to the jury that the defendant need not bring in any witnesses in this case at all. Despite the evidence against the defendant, his own testimony, and the trial court's charge, the Connecticut Supreme Court took the drastic step of upsetting the criminal conviction and ordered a new trial. The Connecticut court did so because the remark of the prosecutor was not "devoid of prejudicial effect on the defendant," was "to the prejudice of the defendant," and most importantly because the court found that the prosecutor's remark was "deliberately intended to undermine the rulings of the trial court" and that a new trial order was required to "effectively prevent such assaults on the integrity of the tribunal." *State v.*

Ubaldi, 190 Conn. at 573, 575, —A.2d—. (Appendix A at 14a, 16a). The Connecticut Supreme Court, it is respectfully submitted, did not properly balance society's needs for effective law enforcement when it ordered a new trial.

The facts of this case, moreover, were strikingly similar to those of *United States v. Hasting*, —U. S.—, 103 S.Ct. 1974, 76 L.Ed. 2d 96 (1983), to which the Connecticut Supreme Court referred in its opinion and which it cited as authority for the need to balance other interests in ordering a new trial. *State v. Ubaldi*, 190 Conn. at 572, —A.2d—. (Appendix A at 13a). An analysis of the facts of *Hasting* and of this case would lead inescapably to the conclusion that the prosecutor's remark was harmless and that the defendant would have been convicted by the jury absent the prosecutor's remark. *See United States v. Hasting*, —U. S.—, 103 S.Ct. at 1981, 76 L.Ed.2d at 107. The new trial order in this case was erroneous under this Court's very recent decision, announced after this case had been argued in the Connecticut Supreme Court.

III.

THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE IN ORDER TO REVIEW THE CONNECTICUT SUPREME COURT'S MISAPPLICATION OF THE PRINCIPLES OF THIS COURT'S RECENT DECISIONS

The Connecticut Supreme Court purported to be exercising its supervisory authority in ordering a new trial in this case.

The text of the Connecticut court's opinion contains multiple references to the "unfairness of the prosecutor's remark" (190 Conn. at 573, Appendix A at 14a), the "prejudice to the defendant" (190 Conn. at 573, 574, 575, Appendix A at 15a, 16a), the need for "a fair trial despite overwhelming evidence" (190 Conn. at 573, Appendix A at 14a), the "harmfulness of the prosecutor's remarks" not being cured by the court charge (190 Conn at 574, Appendix A at 15a), and the remedy for "an unfair trial"

being a new trial (190 Conn. at 570, Appendix A at 11a). In discussing what effect the prosecutor's misconduct should have upon the defendant's conviction, moreover, the Connecticut Supreme Court stated it did not intend to apply "mechanistically" the "standard due process analysis" which requires harmful error before a new trial should be ordered. *State v. Ubaldi*, 190 Conn. at 566, —A.2d—. (Appendix A at 8a). Moreover, the Connecticut Supreme Court discussed at length *United States v. Hasting*, —U. S.—, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983), and *Smith v. Phillips*, 455 U. S. 209 (1982), cases which were concerned with claimed fair trial violations. The Connecticut court's opinion therefore may be read that a new trial was ordered because the prosecutor's remark materially prejudiced[1] the defendant at his trial. This reason for exercising supervisory power, without being called a fair trial due process violation, is nonetheless one.

Thus, the Connecticut court's decision may not be said to clearly, within the four corners of the opinion, rest upon "an adequate and independent state ground." *See Michigan v. Long*, —U. S.—, 103 S.Ct. 3469, —L.Ed.2d— (1983).

As pointed out earlier, the Connecticut Supreme Court discussed and misapplied the balancing test of *United States v. Hasting*. In addition, the Connecticut court also misinterpreted the principal holding of *Smith v. Phillips*, 455 U. S. 209 (1982), applying the harmless error doctrine. The Connecticut Supreme Court attempted to distinguish *Smith v. Phillips* because it involved inadvertent prosecutorial misconduct and this case concerned deliberate misconduct which the *Smith v. Phillips* court only "implied" would be considered in the same manner. *State v. Ubaldi*, 190 Conn. at 569, —A.2d—. (Appendix A at 10a). As interpreted by the Connecticut Supreme Court, *Smith v. Phillips* fell short of precluding in

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1. The Connecticut Supreme Court is restricted to ordering a new trial in situations where the appellant was "materially injured." *See Connecticut v. Johnson*, —U. S.—, 103 S.Ct. 969, 980, 74 L.Ed.2d 823, 837 (1983) (Powell J., dissenting).

all instances an order for a new trial based on a theory of deterring prosecutorial misconduct so long as supervisory power was being exercised. *State v. Ubaldi*, 190 Conn. at 569, —A.2d—. (Appendix A at 10a-11a). As this Court pointed out in *United States v. Hasting*, however, if the supervisory power is purportedly exercised because of a violation of a defendant's fair trial rights, the court exercising that power must still examine the case in light of the harmless error doctrine. *United States v. Hasting*, —U. S.—, 103 S.Ct. at 1978, 76 L.Ed.2d at 104.

The proper standard, whether the prosecutor's conduct was deemed inadvertent or deliberate by the Connecticut court, should have been whether the defendant's trial was unfair or not because of that conduct. *See Smith v. Phillips*, 455 U. S. 209 (1982). The Connecticut court should not have been so concerned with its perception of the prosecutor's culpability that it punished society for that reason alone by ordering a new trial. *See Smith v. Phillips*, 455 U. S. at 220.

The Connecticut Supreme Court's analysis of the *Smith v. Phillips* case was erroneous and the petitioner respectfully requests this Court to correct these erroneous applications of the principles of both the *Hasting* and *Smith* cases.

CONCLUSION

The Connecticut Supreme Court applied a remedy in this case which unnecessarily and unconstitutionally punished society in the absence of any real or material prejudice to the defendant at trial. It did so while citing recent decisions of this Court which condemned such a result. This result endangers the public safety and threatens to deprive society of the domestic tranquility which the state's criminal law is required to insure under the federal Constitution. For these reasons, the State of Connecticut asks this Court to grant a writ of certiorari to review the decision of the Connecticut Supreme Court.

RESPECTFULLY SUBMITTED,

THE STATE OF CONNECTICUT-PETITIONER

Francis M. McDonald
State's Attorney

Bradford J. Ward
Assistant State's Attorney

APPENDIX

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APPENDIX A

STATE OF CONNECTICUT *v.* CHARLES F. UBALDI
(9233)

SPEZIALE, C. J., PETERS, HEALEY, SHEA and GRILLO, Js.

Convicted of the crimes of larceny in the first degree and of larceny in the second degree, the defendant appealed to this court. *Held:*

1. Given its prompt curative instruction to the jurors to disregard in their deliberations an improper question asked the defendant by the state on cross-examination, the trial court did not err in denying the defendant's motion for a mistrial occasioned by that improper question.

2. Because the state, in its summation to the jurors, made remarks deliberately intended to undermine two prior evidentiary rulings by the trial court, a new trial had to be ordered.

Argued April 5—decision released July 5, 1983

Information charging the defendant with five counts of larceny in the first degree and with one count of larceny in the second degree, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Aaronson, J.;* verdict and judgment of guilty and appeal by the defendant to this court. *Error; new trial.*

Timothy C. Moynahan, with whom, on the brief, was *Kevan J. Acton*, for the appellant (defendant).

John A. Connelly, assistant state's attorney, with whom were *Catherine J. Capuano*, special assistant state's attorney, and, on the brief, *Francis M. McDonald*, state's attorney, *Bradford J. Ward*, assistant state's attorney, and *Todd M. DeMatteo*, legal assistant, for the appellee (state).

SHEA, J. The defendant has appealed from his conviction of five counts of larceny in the first degree, in violation of General Statutes § 53a-122, and one count of larceny in the second degree,

in violation of General Statutes § 53a-123,[1] based upon his conversion of tax monies collected on behalf of the City of Waterbury. These charges of larceny against the defendant arose from incidents which occurred during his tenure as a deputy sheriff of New Haven County. At trial the state presented the testimony of numerous witnesses, the substance of which was that the defendant collected back taxes owed the city of Waterbury, deposited the money in a bank account and issued checks on that account for his personal use. The defendant testified on his own behalf and called several witnesses, three of whom testified only to his good character.

The defendant claims a new trial on the ground that the trial court erred in failing to grant either of his two motions for a mistrial. According to the defendant, his motion for a mistrial should have been granted when: (1) during his cross-examination, the prosecutor implied by a question that the defendant had used city funds to pay a gambling debt; and (2) during closing argument, the prosecutor urged the jury to draw an unfavorable inference from the defendant's failure to call a witness whose testimony had been excluded from consideration of the jury by the trial court. We find error only in the refusal to declare a mistrial on the basis of the comments made by the prosecutor during closing argument.

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1. "[General Statutes (Rev. to 1975)] Sec. 53a-122. LARCENY IN THE FIRST DEGREE: CLASS B FELONY. (a) A person is guilty of larceny in the first degree when: (1) The property or service, regardless of its nature and value, is obtained by extortion, or (2) the value of the property or service exceeds two thousand dollars.

"(b) Larceny in the first degree is a class B felony."

"[General Statutes (Rev. to 1975)] Sec. 53a-123. LARCENY IN THE SECOND DEGREE: CLASS D FELONY. (a) A person is guilty of larceny in the second degree when: (1) The property consists of a motor vehicle, (2) the value of the property or service exceeds five hundred dollars, or (3) the property, regardless of its nature or value, is taken from the person of another.

"(b) Larceny in the second degree is a class D felony."

I

The defendant's first claim of error involves the proper bounds of cross-examination. During its case in chief the state introduced financial records showing disbursements made from the bank account into which the defendant had deposited city funds. After the defendant had completed his direct testimony, the state on cross-examination sought to elicit evidence regarding the personal nature of the disbursements made from the account. At one point the following exchange occurred between the assistant state's attorney and the defendant: "Q. And there is a third marking here, Nick Jamele? A. Yes, sir. Q. He is your bookie, isn't he, Mr. Ubaldi?" Defense counsel objected immediately. The jury was excused. The defendant moved for a mistrial and took an exception when the trial court denied the motion. Once the jury reconvened, the trial court issued a cautionary instruction to the jury at the request of the defendant.[2]

The defendant claims that the implication in the question of the prosecutor that Jamele was the defendant's bookie was an attempt to introduce inadmissible evidence of bad conduct. This reference to illegal gambling, according to the defendant, not only unfairly prejudiced him in a general sense, but also undermined his credibility, which was crucial to his theory of defense that he lacked the requisite mens rea to commit the crime charged.

The general rule in Connecticut is that a mistrial is granted only where it is apparent to the court that as a result of some occurrence during trial a party has been deprived of the opportunity for a fair trial. *State v. DeMatteo*, 186 Conn. 696, 703, 443 A.2d

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2. The curative instruction given by the trial court was as follows: "All right, ladies and gentlemen, we are going forward with the trial. Mr. Ubaldi's attorney has objected to the question and I have sustained the objection to the question and he need not answer it and I would urge you to disregard the question itself. Pay no heed to it. It is not relevant. It is not significant in the case. It is to play no part in your deliberations."

915 (1982); *State v. Gooch*, 186 Conn. 17, 25, 438 A.2d 867 (1982); *State v. Turcio*, 178 Conn. 116, 143, 422 A.2d 749 (1979), cert. denied, 444 U. S. 1013, 100 S. Ct. 661, 62 L. Ed. 2d 642 (1980); see Practice Book § 887. When a mistrial is sought on the ground that a prosecutor's improper remarks violated the defendant's constitutional right to due process of law the same standard applies. See *State v. Cosgrove*, 186 Conn. 476, 488-89, 442 A.2d 1320 (1982); *State v. Hawthorne*, 176 Conn. 367, 372, 407 A.2d 1001 (1978). The burden on the defendant is to show that the prosecutor's remarks were prejudicial in light of the entire proceeding. See *State v. Cosgrove*, supra, 488-89; *State v. Hawthorne*, supra, 372; *State v. Kinsey*, 173 Conn. 344, 348-49, 377 A.2d 1095 (1977). The fairness of the trial and not the culpability of the prosecutor is the standard for analyzing the constitutional due process claims of criminal defendants alleging prosecutorial misconduct. *State v. Cosgrove*, supra, 488-89, citing *Smith v. Phillips*, 455 U. S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 78 (1982).

Upon reviewing the defendant's first claim of error, we note that the trial court, as a result of its familiarity with the context in which the prosecutor's remark was uttered, was in a favorable position to evaluate any resultant prejudice. Therefore its determination as to the fairness of the defendant's trial must be afforded great weight. *State v. McCall*, 187 Conn. 73, 77, 444 A.2d 896 (1982); see *State v. DeMatteo*, supra, 704; *State v. Gooch*, supra, 25; *State v. Piskorski*, 177 Conn. 677, 720, 419 A.2d 866, cert. denied, 444 U. S. 935, 100 S. Ct. 283, 62 L. Ed. 2d 194 (1979). We do not condone the assistant state's attorney's inquiry, which carried an ugly innuendo that the defendant gambled illegally with municipal funds. The impropriety of such an implication is unquestionable and its utterance without excuse.[3] The prejudice to

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3. ABA, Standards Relating to the Prosecution Function and the Defense Function, § 5.7(d) (1971) provides: "It is unprofessional conduct to ask a question which implies the existence of a factual predicate which

the defendant, however, was promptly minimized by the action of the trial court. Once an objection to the question was made by the defendant, the jury was dismissed and excluded from the subsequent discussion of the grounds of the objection. Upon reconvening the jurors, the trial court immediately instructed them to disregard completely the state's question. The defendant made no claim at trial, nor has he claimed on appeal, that the curative instruction given to the jury was in any way defective. We have often held that a prompt cautionary instruction to the jury regarding improper prosecutorial remarks obviates any possible harm to the defendant. See *State v. Nowakowski*, 188 Conn. 620, 624, 452 A.2d 938 (1982). *State v. Piskorski*, supra, 720-21; *State v. Hawthorne*, supra, 373. Under the circumstances we find it appropriate to defer to the trial court's determination that the improper question of the prosecutor did not deprive the defendant of a fair trial.

II

The defendant's second claim of error involves the propriety of certain remarks in the state's summation to the jury. During its rebuttal the state sought to subpoena Nick Jamele as a witness, presumably to refute the defendant's statement on cross-examination that certain payments to Jamele were for repairs to the defendant's house. The defendant advised the court, outside the hearing of the jury, that the witness Jamele would seek to exercise his fifth amendment privilege of silence and requested that the court hear argument and testimony on whether such exercise should be permitted in the absence of the jurors to avoid prejudicing them in any way. The court permitted examination of Jamele outside the jury's presence. Apparently Jamele was facing federal prosecution

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the examiner cannot support by evidence." In addition, the Code of Professional Responsibility, DR-7-106(C)(1), prohibits an attorney appearing before a tribunal from stating or alluding "to any matter . . . that will not be supported by admissible evidence."

for gambling activities and for tax evasion. During the examination the state sought to question Jamele regarding the nature of any construction work done for the defendant, whether Jamele had received money from the defendant, whether the recorded payments were for work done on the defendant's property, and whether they were reported to federal income tax authorities. The trial court sustained the right of the witness to remain silent in each of these areas of inquiry, thereby foreclosing any examination of Jamele before the jury. The state took exception to each of the court's rulings, but has not pressed any claim of error in this matter on appeal.

During closing argument the state remarked: "Where is Nick Jamele? Where is the man that he [the defendant] paid six thousand dollars to?" The defendant immediately objected to the comment, but the trial court overruled the objection and allowed the state to continue without any cautionary instruction to the jury.[4] Later, outside the presence of the jury and prior to the jury charge, the defendant moved for a mistrial on the ground that, because of the court's instruction for the jury to disregard the question implying that Jamele was the defendant's bookie and Jamele's successful invocation of his fifth amendment privilege, the state's request that an unfavorable inference be drawn from the defen-

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4. "Mr. Ward: Where is Nick Jamele? Where is the man that he paid six thousand dollars to?

"The Court: Please, let there be no whispering in the courtroom.

"Mr. Moynahan: Objection, Your Honor. May I approach the bench?

"The Court: Yes.

"I take it counselor you don't intend to pursue it more than you have already?

"Mr. Ward: No, Your Honor.

"Where was John Bedell? Why didn't he come forward and testify?

"Mr. Moynahan: Same objection, Your Honor.

"Mr. Ward: May I continue, Your Honor?

"The Court: Yes."

dant's failure to call Jamele was improper. The state responded that the remark was a rhetorical question within the proper bounds of summation. When the trial court denied the motion for mistrial, the defendant took an exception to the ruling but did not request that any special instructions be given to the jury.

The state has not attempted on appeal to justify its challenged remarks upon the ground urged in the trial court or on any others. Instead, the state asks this court to apply the due process analysis discussed in part I of this opinion to the closing remarks of counsel and to sustain the conviction because insufficient prejudice befell the defendant as a result. The state argues that our decision in *State v. Daniels*, 180 Conn. 101, 429 A.2d 813 (1980), should govern our determination here. In *Daniels*, the defendant appealed from his assault conviction on the ground that the trial court erred in permitting the state to urge in summation that the jury draw adverse inferences from the failure of the defendant to call two witnesses, whose availability was never established. Id., 107. Although that appeal presented the issue of whether, when the defendant objected to the remarks, the trial court's failure to take contemporaneous action to caution the jury deprived the defendant of a fair trial and not the present issue of the propriety of the denial of a motion for a mistrial, the state maintains, nevertheless, that the factors analyzed by the court in *Daniels* are applicable here. In *Daniels* we indicated that the following factors supported a determination that the prosecutor's remarks had not deprived the defendant of a fair trial: (1) the missing testimony was not crucial to the defendant's case; (2) the state's case against the defendant was strong; (3) the defendant's case was relatively weak; (4) the defendant had testified and so his right to remain silent had not been jeopardized; (5) the general jury instructions regarding the burden of the state to prove every element of the alleged crimes and the defendant's right to remain silent were correct; (6) the defendant did not request that the improper remark be stricken and that a curative instruction be given in addition to moving for a mistrial; and (7) the defendant took no exception to the general

charge to the jury. Id., 112-13. We decline, however, the state's invitation to apply *Daniels* or the standard due process analysis mechanistically to a case involving intentional prosecutorial misconduct.

Our review of Connecticut case law dealing with prosecutorial misconduct has failed to uncover a situation precisely like the one before us.[5] In the court below the state first made an inquiry implying some unlawful transactions between the defendant and Nick Jamele, which the trial court instructed the jury to disregard. The state then sought to produce Jamele as a witness in order to prove the unsavory character of his relationship with the defendant. When the court ruled against the state, permitting Jamele to invoke the fifth amendment privilege and effectively depriving the state of such testimony, the state duly excepted to the ruling. Afterwards, in total disregard of that ruling intended to protect the defendant against consideration by the jury of irrelevant and prejudicial matters, the state's attorney argued that the jury should draw a negative inference from the fact that the defendant had not produced Jamele as a witness.

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5. *State v. Perelli*, 128 Conn. 172, 21 A.2d 389 (1941), is the only instance of prosecutorial misconduct factually similar to that in the case at bar. In *Perelli*, a prosecutor in argument referred to testimony which had been stricken from the record on the ground that it was inadmissible hearsay. Id., 179. This court declined to view the remark as a basis for reversible error because the testimony should have been admitted, and would have been admitted had the trial court not misread a prior ruling of this court on the identical matter raised at the defendant's first trial. *Perelli* is distinguishable from the present case in that the state here makes no claim that the trial court's rulings were erroneous. Moreover, in *Perelli*, the issue of prosecutorial misconduct was apparently raised for the first time on appeal, since there was no record of a timely objection to the prosecutor's remarks or of a timely motion for mistrial.

The prosecutor's argument to the jury was improper both because the inference sought was clearly impermissible and because it demonstrated a complete disregard for the tribunal's rulings.[6] The record of the proceedings affords no reasonable inference that this remark of an experienced prosecutor was inadvertent and on appeal the state wisely makes no such claim.[7] Instead, the state insists that this court can only reverse the trial court if the proceedings below, when taken in their entirety, could be deemed to have deprived the defendant of his constitutional right to a fair trial. The ultimate implication of this argument is that a state's attorney may choose deliberately to ignore any trial court ruling

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6. In criminal prosecutions either the state or the defendant may argue to the jury that an unfavorable inference should be drawn from the absence of a particular witness at trial. Permission from the trial court must be sought in advance when either party wishes to include such an inference in its closing remarks. Such an inference is to be permitted only where "there is sufficient evidence for the jury to find that the absent witness is (1) available to the party against whom the inference is sought to operate and (2) one whom that party would naturally be expected to produce." *State v. Daniels*, 180 Conn. 101, 113-14, 429 A.2d 813 (1980). Clearly the state had no right to such an inference once the trial court ruled that Jamele could exercise his right to remain silent. Nor does the record indicate that a request for such an inference was made to the court. As such, the prosecutor's remark constituted misconduct. "It is unprofessional conduct for the prosecutor intentionally to . . . mislead the jury as to the inferences it may draw." ABA, Standards Relating to the Prosecution Function and the Defense Function, § 5.8 (a) (1971); see Code of Professional Responsibility DR 7-102 (A) (5). By seeking the inference, the prosecutor demonstrated a flagrant disregard of the trial court's authority. "A lawyer shall not disregard . . . a ruling of a tribunal made in the course of a proceeding . . . ." Code of Professional Responsibility DR 7-106(A); see ABA, supra, § 5.2(a).

7. The defendant has claimed that although the court denied his motion for a mistrial on the basis of the prosecutor's inquiry implying that Jamele was a "bookie," the court in chambers instructed the assistant state's attorney "that was an area that should be stayed away from if there is no evidence for it." The state has not challenged this assertion.

just as long as the state has amassed overwhelming evidence of a defendant's guilt and the state's attorney's misconduct relates to only a portion of that evidence. We decline to place such a restraint on the ability of this court to defend the integrity of the judicial system.

In *Smith v. Phillips*, 455 U. S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982), the United States Supreme Court held that the constitutional guarantee of due process of law does not require granting a new trial when a defendant could not demonstrate that inadvertent prosecutorial misconduct[8] resulted in prejudice sufficient to deprive him of a fair trial. "[T]he aim of due process 'is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused' [*Brady v. Maryland*, 373 U. S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)]." Id., 219; see *State v. Cosgrove*, supra, 488-89. The court also implied that the same analysis should apply to claims of deliberate prosecutorial misconduct. *Smith v. Phillips*, supra, 220n. The

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8. The respondent in *Smith v. Phillips*, 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982), was before the United States Supreme Court seeking federal habeas corpus relief. He sought to vacate his conviction based on the fact that one of the jurors in the case had applied during the course of trial for a position as an investigator with the district attorney's office. A connection between the application and the juror was eventually made by members of the office and the application was brought to the attention of the two attorneys prosecuting the respondent's case more than one week before the end of trial. The prosecutors concluded that there was no need to inform the trial court or the defendant of the juror's actions in light of the juror's candor during voir dire about his intent to pursue a career in law enforcement. Id., 212-13. In denying the respondent's post-trial motion to vacate, the trial court judge found that with respect to the prosecutor's conduct, there was no evidence to suggest "a sinister or dishonest motive with respect to [the juror's] letter of application." Id., 214, quoting *People v. Phillips*, 87 Misc. 2d 613, 619, 384 N.Y.S. 2d 906 (1975). It also concluded that the events giving rise to the motion had not influenced the verdict. Id., 211.

court recognized, however, that its ruling in a federal habeas corpus case fell short of precluding in all instances an order for a new trial based on a deterrence theory. "Even if the Court of Appeals believed, as the respondent contends, that prosecutorial misbehavior would 'reign unchecked' unless a new trial was ordered, it had no authority to act as it did. Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." Id., 221.

The questions before this court then are whether we should grant a new trial in order to deter prosecutorial misconduct which deliberately circumvents trial court rulings and, if so, whether such authority should be exercised in the circumstances presented.

In Connecticut the appropriate remedy for an unfair trial due to prosecutorial misconduct is to vacate the judgment of conviction and to grant a new trial. See *State v. Santello*, 120 Conn. 486, 181 A. 335 (1935); *State v. Moran*, 99 Conn. 115, 121 A. 277 (1923); *State v. Ferrone*, 97 Conn. 258, 116 A. 336 (1922); *State v. Ferrone*, 96 Conn. 160, 113 A. 452 (1921). We have not previously addressed the issue of to what extent deliberate prosecutorial misconduct during trial which violates express trial court rulings, unchallenged by the state on appeal, may serve as a basis for vacating a judgment of conviction. We have long held that a court has inherent power to defend its dignity and authority through criminal contempt adjudications; see *Moore v. State*, 186 Conn. 256, 259, 440 A.2d 969 (1982); *Whiteside v. State*, 148 Conn. 77, 78, 167 A.2d 450 (1961); or to uphold the integrity of its orders through civil contempt proceedings. See *Welch v. Barber*, 52 Conn. 147, 156-57, 52 A. 567 (1884). Appellate tribunals are endowed with a similar power. An appellate court has a "certain inherent supervisory authority over the administration of justice"; *United States v. Butler*, 567 F.2d 885, 893 (9th Cir. 1978); in the trial courts below that permits action to deter prosecutorial misconduct which is "unduly 'offensive to the maintenance of a sound judicial process.' " (Citation omitted.) *People v. Swan*, 56 Mich. App. 22, 31-32, 223 N.W.2d 346 (1974);

see, e.g., *United States v. Payner*, 447 U.S. 727, 735 n.7, 100 S. Ct. 2439, 65 L. Ed. 2d 468, reh. denied, 448 U.S. 911, 101 S. Ct. 25, 65 L. Ed. 2d 1172 (1980); *United States v. Capone*, 683 F. 2d 582, 586 (1st Cir. 1982); *United States v. Nembhard*, 676 F.2d 193, 199 (6th Cir. 1982); *United States v. Butler*, supra, 890; *United States v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968); *State v. Steward*, 162 N.J. Super. 96, 99, 392 A.2d 234 (1978); *State v. Farrell*, 61 N.J. 99, 104, 293 A.2d 176 (1972); *State v. Bartlett*, 96 N.M. 415, 418, 631 P.2d 321 (N.M. App. 1981); *Commonwealth v. Virtu*, 495 Pa. 59, 68-69, 432 A.2d 198 (1981).

Some tribunals have declined to use such supervisory power on the theory that society should not bear the burden of a new trial because of prosecutorial misconduct where a new trial is not constitutionally mandated. See, e.g., *United States v. Modica*, 663 F. 2d 1173, 1184 (2d Cir. 1981); *State v. Haskins*, 316 N.W.2d 679, 680-81 (Iowa 1982); *People v. Galloway*, 54 N.Y.2d 396, 401, 430 N.E.2d 885 (1981). According to some authorities, the evil of overzealous prosecutors is more appropriately combatted through contempt sanctions, disciplinary boards or other means. See generally *United States v. Modica*, supra, 1182-85; *Commonwealth v. Virtu*, supra, 74 (Larsen, J., dissenting). This court, however, has long been of the view that it is ultimately responsible for the enforcement of court rules in prosecutorial misconduct cases. *State v. Ferrone*, 97 Conn. 258, 270, 116 A. 336 (1922). Upsetting a criminal conviction is a drastic step, but it is the only feasible deterrent to flagrant prosecutorial misconduct in defiance of a trial court ruling. We are mindful of the sage admonition that appellate rebuke without reversal ignores the reality of the adversary system of justice. " 'The deprecatory words we use in our opinions . . . are purely ceremonial.' Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice [of verbal criticism without judicial action]—recalling the bitter tear shed by the Walrus as he ate the oysters—breeds a

deplorably cynical attitude towards the judiciary." *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir.) (Frank, J., dissenting), cert. denied, 329 U. S. 742, 67 S. Ct. 49, 91 L. Ed. 640, reh. denied, 329 U. S. 826, 67 S. Ct. 182, 91 L. Ed. 701 (1946); see *United States v. Bivona*, 487 F.2d 443, 447 (2d Cir. 1973) (citing Frank, J., with approval). Moreover, "[d]eliberate prosecutorial misconduct is presumably infrequent; to invalidate convictions in the few cases where this is proved, even on a fairly low showing of materiality, will have a relatively small impact on the desired finality of judgments and will deter conduct undermining the integrity of the judicial system." *United States v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968).

We recognize that the reversal of a criminal conviction in the exercise of a court's supervisory authority must not be undertaken without balancing other interests which may be involved. *United States v. Hastings*, U. S. (50 U.S.L.W. 4572, 4574 [May 24, 1983]). The trauma which the victim of a heinous crime might undergo by being forced to relive a harrowing experience or the practical problems to be encountered in retrying a case several years after the event require a cautious approach. Id. In the case before us we can visualize no serious obstacles of this kind to a retrial. The victim of the embezzlement which constituted the basis of the larceny charge was the city of Waterbury. Although some of the witnesses for the state who testified at the trial may prove to be unavailable for a retrial, not all of them would be required to enable the state to prove its case. The testimony at the first trial of those who cannot be produced can be introduced. *Taborsky v. State*, 142 Conn. 619, 624, 116 A.2d 433 (1955); see *State v. DeFreitas*, 179 Conn. 431, 441n, 426 A.2d 799 (1980); McCormick, Evidence (2d Ed.) §§ 254-55; Fed. R. Evid. 804(b)(1). Furthermore, the testimony of the defendant concerning his receipt of the tax payments and his failure to turn over the funds to the city can be used as admissions. *Hope v. Valente*, 86 Conn. 301, 307, 85 A. 541 (1912); see McCormick, Evidence (2d Ed.) § 254. We do not have a situation here where highly

significant competing social interests outweigh the important judicial consideration of restraining serious prosecutorial misconduct.

No matter how overwhelming the evidence, a court may not direct a verdict of guilty in a criminal case. General Statutes § 54-89; *State v. Chapman*, 103 Conn. 453, 486, 130 A. 899 (1925). The case before us is not one where the action of the prosecuting attorney was devoid of prejudicial effect on the defendant. Compare *United States v. Drummond*, 481 F.2d 62 (2d Cir. 1973) (reversal because of improper summation absent substantial prejudice). It was to avert unwarranted prejudice that the trial court had told the jury during the cross-examination of the defendant to disregard the prosecutor's remark that Nick Jamele was the defendant's bookie. Later the court foreclosed the state from calling Jamele as a witness and from questioning him in front of the jury by ruling that he had a right to invoke the constitutional privilege of silence in every area of relevant state inquiry. These rulings deprived the state of the opportunity to attack the defendant's character before the jury by either linking the defendant and Jamele in some illicit activity or simply by associating the defendant with a witness who chose to exercise his constitutional right to remain silent. Undaunted, the state then waited until summation to attempt to present the jury with the very innuendo which the court had precluded and argued that they should bear in mind that the defendant had never called Jamele as a witness. The unfairness of this remark is obvious. The negative inference the prosecutor asked the jury to draw from the failure of the defendant to have Jamele testify implied that the defendant was obligated to produce a witness whose invocation of his constitutional right made it impossible to present his testimony. Furthermore, the reference to Jamele as a witness whom the defendant would naturally produce implied an association of the defendant with a person who had been identified as a "bookie." Its effect was to undermine the authority of the trial court's ruling that such a matter should not be considered by the jury. "By reason of his

office, [a state's attorney] usually exercises great influence upon jurors." *State v. Ferrone*, 96 Conn. 160, 168, 113 A. 452 (1921); accord *United States v. Capone*, 683 F.2d 582, 585 (1st Cir. 1982).

The prejudice to the judicial system as well as to the defendant which flows from circumventing the trial court's authority, unlike the prejudice which can be calculated by weighing the evidence presented, is not easily assessed. Accord *People v. Swan*, 56 Mich. App. 22, 32 n.6, 223 N.W.2d 346 (1974). "If the accused be guilty, he should none the less be convicted only after a fair trial, conducted strictly according to the sound and well-established rules which the laws prescribe." *State v. Ferrone*, supra, 169. We note that the trial court did not rebuke or admonish the prosecutor upon the defendant's objection to the improper argument. See *State v. Daniels*, 180 Conn. 101, 111 n.10, 429 A.2d 813 (1980); *State v. Benton*, 161 Conn. 404, 413, 288 A.2d 411 (1971). The trial court's general charge to the jury which included the standard instructions relating to the state's burden of proof and the defendant's right to remain silent cannot reasonably be viewed as obviating the harmfulness of the prosecutor's remarks. See *State v. Ferrone*, supra, 168. Nor do we view the failure of the defendant to request a curative instruction in addition to a mistrial as fatal to his claim where deliberate prosecutorial misconduct was met by the trial court's silence in response to a proper objection during summation. Id., 168; see *State v. Hawthorne*, 176 Conn. 367, 372n, 407 A.2d 1001 (1978); *State v. Santello*, 120 Conn. 486, 493, 181 A. 335 (1935); *State v. Moran*, 99 Conn. 115, 121-22, 121 A. 277 (1923).

We are not today abandoning the due process analysis we have consistently applied to constitutional claims of prosecutorial misconduct not involving purposeful disregard of a ruling, which requires the defendant to prove that he was deprived of a fair trial as the result of the misconduct in order to secure a new trial. Nor are we retreating from our statement that "[c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate

argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument." *State v. Laudano*, 74 Conn. 638, 646, 51 A. 860 (1902); see *State v. Greenberg*, 92 Conn. 657, 663, 103 A. 897 (1918). We adhere to the principle, however, that "[w]hile the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury have no right to consider." (Citations omitted.) *State v. Ferrone*, 96 Conn. 160, 169, 113 A. 452 (1921); see *State v. Kinsey*, 173 Conn. 344, 351, 377 A.2d 1095 (1977) (*Loiselle, J.*, concurring), quoting *State v. Ferrone* with approval. Where a prosecutor in argument interjects remarks deliberately intended to undermine the rulings of the trial court to the prejudice of the defendant, his conduct is so offensive to the sound administration of justice that only a new trial can effectively prevent such assualts [*sic*] on the integrity of the tribunal.

There is error, the judgment is set aside and a new trial is ordered.

In this opinion the other judges concurred.